



COMMONWEALTH of VIRGINIA

Department of Health

P O BOX 2448
RICHMOND, VA 23218

TDD 1-800-828-1120

December 12, 2003

MEMORANDUM

TO: District Health Directors
Environmental Health Managers
Environmental Health Specialists

FROM: Robert B. Stroube, M.D., M.P.H.
State Health Commissioner

SUBJECT: Policy for Processing Requests from the *Onsite Sewage Indemnification Fund* (§ 32.1-164.1:01 of the *Code of Virginia*)

AUTHORITY, PURPOSE AND GUIDING PRINCIPLES FOR POLICY

Title 32.1-164.1:01 of the *Code of Virginia* states that "the Board may promulgate regulations pursuant to the Administrative Process Act (§ 9-6.14:1 et. seq.) for the administration of the fund consistent with this chapter". See Appendix A for a copy of the law. No regulations currently exist regarding the processing of indemnification fund requests. Until the Board of Health adopts such regulations, this policy will govern the procedures for accepting, investigating, processing, and approving or denying requests for indemnification.

PURPOSE OF POLICY:

1. To inform Virginia real property owners how to apply for indemnification.
2. To establish the procedure and time limits for processing and investigating *Fund* requests.
3. To establish the principles that will determine which costs, if any, are reimbursable under the *Fund*.

GUIDING PRINCIPLES:

1. The *Fund* is a limited and finite resource. *Fund* monies shall be used and awarded so that it assists as many qualifying property owners as possible. VDH will reimburse qualifying owners in a manner that assures sufficient funds remain available for future qualifying owners.

2. When the conditions for indemnification apply, the *Fund* will reimburse owners for the reasonable costs that the owner previously paid to install the failed system. When the actual costs of the failed system are unknown, the Commissioner shall use Appendix E to reimburse owners for the reasonable costs of the failed system. The *Fund* indemnifies owners for the cost of the system that failed, not the repair system or other costs.
3. The *Fund* does not pay for or insure the negligent conduct of any private party, including private consultants, soil scientists, engineers, contractors, builders, septic installers, or authorized onsite soil evaluators (AOSE). Examples of private party error include, but are not limited to the following: (1) non-VDH employees who improperly locate a sewage system, (2) users with excessive water use, grease, or wastewater strength, (3) persons improperly installing sewage systems, or (4) owners improperly operating or maintaining sewage systems.
4. The *Fund* does not reimburse owners for consequential damages not directly related to the installation of the sewage system. Examples of consequential damages include, but are not limited to the following: water damage; irrigation systems; tree removal and lost trees; inflation or lost wages; driveway or pavement repair; grading, seeding or shrubbery; meals and lodging; system operation and maintenance; electrical power to use the system; legal fees; and travel expenses.

DEFINITIONS

"Agent" means a legally authorized representative of the owner.

"Commissioner" means the State Health Commissioner or his subordinate who has been delegated powers in accordance with this policy.

"DOSWS" means the Division of Onsite Sewage and Water Services, or its administrative successor within the Office of Environmental Health Services ("OEHS") of the Virginia Department of Health.

"Failed sewage system" means the definition outlined by §350 of the *Sewage Handling and Disposal Regulations* (12 VAC 5-610, "*Regulations*").

"Indemnify" means to reimburse a qualified Virginia real property owner under § 32.1-164.1:01, *Code of Virginia* for the reasonable costs previously paid to install a sewage system that failed, or using Appendix E of this policy when the actual cost of the failed system cannot be determined.

"Sewage system construction date" means the date the local health department or AOSE/PE inspected and approved the owner's sewage system, or the date of completion written on the contractor's completion statement. The construction date IS NOT the date the system is first used or the date the Operation Permit is issued.

"Virginia real property owner" means, any person, any group of individuals acting individually or as a

group, or any public or private institution, corporation, company, partnership, firm or association which owns a sewerage system or treatment works, as defined by the *Regulations*, on a property located in the Commonwealth of Virginia.

"Virginia Department of Health employee" means any officer, employee or agent of VDH, or any person acting on behalf of VDH in an official capacity, temporarily or permanently in the service of the Commonwealth.

REQUIREMENT TO FILE TIMELY AND COMPLETE APPLICATION

Notice of Claim.

The *Fund* shall bar all claims from consideration unless the claimant submits a completed application, which includes the time and place at which the sewage system failure is alleged to have occurred, to the Director of DOSWS, 109 Governor Street, 5th Floor, Room 538, Richmond, Virginia 23219 within one year from the date that the system first failed. Unless all required information is provided in the application, it is incomplete.

VDH recommends that claimants mail the notice of claim via the United States Postal Service by certified mail, or other appropriate tracking method, addressed to the Director of DOSWS to assure that it is received.

In any action contesting the filing of the notice of claim, the burden of proof shall be on the claimant to establish mailing in conformity with this section. The notice shall be timely received if an official receipt shows the mailing was within the prescribed time limit stated above.

Failure to submit complete application.

If the owner submits an incomplete application, DOSWS shall return it to the owner. The Commissioner shall only consider complete applications that are properly submitted within the prescribed time frame. The Commissioner may allow reasonable time for the owner to correct an incomplete application that is submitted within one year from the date that the system first failed.

Application involving an unapproved sewage system.

An owner who does not possess an Operations Permit for the sewage system because of a failed construction inspection, but subsequently operated the system without making required corrections, shall not be entitled to receive monies from the *Fund*.

ASSESSMENT OF CLAIMS

Only pay for reasonable costs of the failed system.

The *Fund* shall be used to pay owners for the reasonable cost of the failed system when costs are known, or in accordance with Appendix E, which may be periodically modified or adjusted when costs are not known or reasonable. Owners shall be responsible for all costs associated with the repair system.

Limit of claims.

The Commissioner will not reimburse any qualifying owner more than \$15,000.00 for a failed onsite sewage system serving a single-family dwelling or an equivalent non-residential structure. Where a failed sewage system serves multiple dwelling units or an equivalent non-residential structure, the Commissioner will not reimburse any qualifying owner more than \$50,000.00.

Determining the date of system failure.

The date of system failure may be defined using one or more of the following dates:

1. The date that an owner submits an application for repair to the local health department.
2. The date that a local health department sends a Notice of Violation to the owner which acknowledges that an apparent failure occurred and voids the operating permit.
3. The date that an owner pays or receives an invoice from professionals working in the onsite sewage industry to evaluate or repair the system.
4. The date that an owner pays or receives invoices from sewage pump and haulers to pump the contents of the septic tank when such pumping was not part of routine operation and maintenance.
5. The date that an owner receives a repair permit.
6. The date that an owner files written complaints or otherwise notifies third parties (such as a builder, septic installer, state agency, or other contractor) in writing that his sewage system is not working properly.

Verbal and written statements, affidavits, and other information that is not corroborated by disinterested third parties shall not be considered sufficient evidence to show that a failure occurred within three years of the system's construction date.

Reimbursement.

The Commissioner shall reimburse a claim if the notice of claim complies with Part III of this policy and it is determined that the system, which was installed in the State of Virginia, failed within three years from the date of its construction and such failure "results from the negligence of the Department of Health".

When VDH is one party among multiple parties whose negligence caused a system to fail, VDH may assist the owner “in seeking redress from the system's builder” (§ 32.1-164.1:01). Mere failure of a VDH employee to discover the negligent conduct of others whose actions caused a failure is not sufficient to justify an award. Contributory negligence of the owner may compromise or reduce recovery from the *Fund*.

INDEMNIFICATION FUND APPLICATION PROCESS

DOSWS evaluation.

After receiving an application for indemnification, DOSWS shall review it for completeness and schedule a site evaluation if necessary. The owner must allow access to the property to assure that all relevant facts and data are obtained. If an owner refuses access, DOSWS shall return the application and take no further action.

When an owner submits a complete application, DOSWS shall review the health department's entire record and, if necessary, perform a site and soil evaluation, a sanitary survey, or other such inspection or investigation necessary to determine the cause of failure. DOSWS may hold an informal hearing. The informal hearing process shall follow the procedures outlined in § 200.A of the *Regulations*. The informal hearing may consider any of the following:

1. Whether sufficient evidence exists to show that the system failed within three years from its construction date.
2. Whether sufficient evidence exists to establish that VDH negligence caused a system to fail.
3. Hydraulic conductivity or percolation data prior to or after the failure occurred.
4. Soil descriptions and site characteristics to determine their accuracy and completeness (number and location of profile holes, depth of profile holes, soil and site documentation).
5. Setback distances, landscape position, and other physical features.
6. Review of effluent samples which may be collected from the failing system or repair system.
7. Facts that are relevant to determine whether or how a system failed (i.e. measurement of the owner's average and peak daily water or sewage flows, etc).

Decision by the Commissioner.

The Commissioner may approve or deny the application, approve the application with conditions, and/or approve a partial award.

Upon finding that the requirements for indemnification have been met, the Commissioner shall authorize reimbursement in accordance with Appendix E and this policy.

Release of further claims.

DOSWS shall prepare a release that releases the Commonwealth, its political subdivisions, agencies, and instrumentalities, agents and representatives from any and all claims. The release shall be signed and notarized. Payments under the *Fund* shall be conditioned upon the execution and delivery of a complete release to the Commissioner.

APPEAL AND SETTLEMENT OF CLAIMS

Appeal of a decision.

Owners may challenge a decision except in those cases when the owner did not submit a complete application. To challenge an adverse decision, an owner must submit a written request addressed to Susan Sherertz, Secretary to the Board, Sewage Handling and Disposal Appeal Review Board, 109 Governor Street, 5th Floor, Room 518, Richmond, Virginia 23219 within 30 days after receiving the denial notice. The request must include the required \$135.00 fee.

Election of remedies and settlement.

If an owner pursues two or more simultaneous methods of remedy, then VDH reserves its right to discontinue processing the indemnification fund claim. The Commissioner shall have the authority to compromise, settle, and discharge claims for indemnification.

§ 32.1-164.1:01. Onsite Sewage Indemnification Fund.

There is hereby created the Onsite Sewage Indemnification fund whose purpose is to receive moneys generated by a portion of the fees collected by the Department of Health pursuant to subsections C and E of § 32.1-164 and appropriated by the Commonwealth for the purpose of assisting any Virginia real property owner holding a valid septic tank or other onsite sewage system permit when such system fails within three years of construction and such failure results from the negligence of the Department of Health. The fund may also be used, in the discretion of the Board, to support the program for training and recognition of authorized onsite soil evaluators.

Ten dollars of each fee collected by the Department of Health pursuant to subsections C and E of § 32.1-164 shall be deposited by the Comptroller to this fund to be appropriated for the purposes of this section to the Department of Health by the General Assembly as it deems necessary.

The owner of a septic tank or other onsite sewage system permitted by the Department of Health may request the Commissioner to review the circumstances of the onsite sewage system failure and grant indemnification from the fund, if the septic tank or other onsite sewage system is permitted by the Department and has failed within three years of construction. Upon finding that the system was permitted by the Department and has failed within three years of construction and that the failure resulted from Department of Health negligence, the Commissioner shall grant the request for indemnification. If the Commissioner finds that the system was permitted by the Department and has failed within three years of construction and that the failure resulted from faulty construction, the Commissioner may assist the owner of the failed system in seeking redress from the system's builder.

If the Commissioner refuses the request for indemnification, the requesting individual may appeal the refusal to the State Health Department Sewage Handling and Disposal Appeal Review Board.

The Board may promulgate regulations pursuant to the Administrative Process Act (§ [2.2-4000](#) et seq.) for the administration of the fund consistent with this chapter.

In the event the fund is insufficient to meet requests for indemnification, this section and the creation of the fund shall not be construed to provide liability on the part of the Department or any of its personnel where no such liability existed prior to July 1, 1994.



COMMONWEALTH of VIRGINIA

Department of Health

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RICHMOND, VA 23218

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Application for Indemnification

Mail this completed application by certified mail or other appropriate tracking method, to Dwayne Roadcap, Program Manager, Office of Environmental Health Services, 109 Governor Street, 5th Floor, Room 538, Richmond, Virginia 23219.

Owner(s): _____ SSN#: _____

Address: _____ Email: _____

Phone No: (Home) _____ (Work) _____ (Cell) _____

Legal description of the property where the failed sewage system was located (obtain from Deed): _____

Define the date that your system failed:

1. What is the date that the contractor installed the sewage system? _____. Attach a copy of the completion statement and the health department's inspection record.
2. What is the date that the health department approved the sewage system? _____. Attach a copy of the Operation Permit.
3. What is the date that you received a Notice of Violation from the health department? _____. Attach a copy of the notice of violation.
4. Did you pay a professional to inspect or service the failed sewage system? ____ , If Yes, when?

5. Did you send letters to anyone regarding the failed sewage system? ____ If Yes, what was the date(s) of the letter(s)?
_____. Attach a copy of the letter(s).
6. What other information substantiates that your sewage system failed within three years from the date of its construction? Attach copies of all additional information. _____

7. From the date of this sewage system's construction, when did it fail? ____ years ____ months ____ days

Show that you properly operated and maintained the sewage system:

8. What is your average daily water use? _____ gallons per day (GPD). Attach copy of previous 12 months of water use records, if available.
9. What were you required to do regarding the failed system's operation and maintenance (O&M)? _____. Attach O&M manual, if applicable.
10. What are the dates that you performed operation and maintenance? _____. Attach a copy of the maintenance log or other O&M records for the failed sewage system, if available.
11. Did you properly operate and maintain the sewage system in accordance with the recommendations of the system's designer and the manufacturer? _____ If No, please describe what O&M was not done.
- _____
- _____

Discuss your allegations:

12. What was the cost of the failed system? _____ Attach invoices, contracts, bill of sale, etc. to show the failed system's cost. If you do not know the cost to install the failed system, write "N/A".
13. Did a health department employee perform a site and soil evaluation for the sewage system that failed? _____, If Yes, when? _____
14. Did a private contractor perform a site and soil evaluation for the failed system? _____, If Yes, who performed the site and soil evaluation. _____, when? _____
15. Did a health department employee inspect and approve the failed system's construction? _____, If Yes, when? _____
16. Was the failed sewage system installed in the correct location? _____ If No, please describe where it was located. Attach survey plat showing owner's house and the location of the sewage system. _____
- _____
- _____
- _____
17. Was the failed sewage system installed correctly? _____ If No, please describe what defects were present:
- _____
- _____
- _____
18. Did the site and soil conditions comply with the *Regulations* in the location where the contractor installed the sewage system? If No, please describe how they did not comply. _____
- _____
- _____
- _____
19. Why do you believe that this sewage system failed? _____
- _____
- _____
- _____

All information included with this application is true and complete to the best of my knowledge. I hereby give permission for Virginia Department of Health to enter on the above described property for the purpose of processing this application.

Sign: _____ (owner) _____ (owner) _____ (Date)

Appendix C:



COMMONWEALTH of VIRGINIA

Department of Health

P O BOX 2448
RICHMOND, VA 23218

TDD 1-800-828-1120

[Date]

[Owner]
[Address]
[City, State]

CERTIFIED MAIL

Ref: Receipt of Application for Indemnification

Dear [Owner]:

The Division of Onsite Sewage and Water Services received your application for indemnification on [date]. The Onsite Sewage Indemnification Fund (§ 32.1-164.1:01 of the *Code of Virginia*) assists any Virginia real property owner holding a valid permits when his or her sewage system fails within three years of construction because of Virginia Department of Health negligence. Enclosed is a copy of the law and VDH's policy.

After I review your application and other materials, I will contact you regarding the review process. Should you have any further questions or concerns, do not hesitate to call me at (804) 864-7462.

Sincerely,

[Name]
[Title]



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RICHMOND, VA 23218

TDD 1-800-828-1120

[DATE]

[Owner]
[Address]
[City, State]

CERTIFIED MAIL

Ref: Incomplete Application for Indemnification

Dear [Owner]:

On [date], you submitted an application for indemnification, which asked the Commissioner to reimburse you for a failed sewage system because of Virginia Department of Health ("VDH") negligence. The Division of Onsite Sewage and Water Services completed its preliminary review of your application and determined that certain information is missing. Specifically, you did not include the following:

1. [list]
- 2.
- 3.
- 4.
- 5.

Because your application is incomplete, VDH cannot process your application. Consequently, I am returning it. To qualify for consideration, you must file a complete application by certified mail or hand delivery within one year from the date that your system failed. If you cannot complete the application within that time frame, please call me so that we can discuss a reasonable time period for you to submit a complete application.

Enclosed is a copy of VDH's policy. Should you have additional questions, please call me at (804) 864-7462.

Sincerely,

[Name & Title]

Chart of Compensable Expenses when Actual Costs are Unknown

Compensable Construction Item	Price (Material and Labor)
Sewer Line: 4-inch Sch. 40 piping (or equivalent) per linear foot	\$3.00
Septic Tank per 1000 Gallons	\$1,000.00 (May increase \$500.00 for rock)
Conveyance Line or 4-inch Sch. 35 pipe per linear foot	\$2.00
Secondary Treatment Unit (including pump and components)	\$6,000.00 (May increase \$500.00 for rock)
Advanced Secondary Treatment Unit (including pump and components)	\$10,000.00 (May increase \$500.00 for rock)
Pump Chamber and pump components (dispensing STE)	\$1,500.00 (May increase \$500.00 for rock)
2-inch Sch. 40 force main (or equivalent) per linear foot and fittings	\$3.00
Distribution box and related components	\$175.00 (Add \$100.00 for manifold) (Add \$50.00 for stilling basin)
Non-pressure: absorption area of trench bottom per ft ²	\$2.50 for depths ≤ 48" \$3.00 for depths > 48"
Pressure: absorption area of trench bottom per ft ²	\$3.50 for depths ≤ 48" \$4.00 for depths > 48"
Site evaluation and design services from non-Professional Engineer (AOSE)	\$1,500.00 (\$750.00 for Site Evaluation) (\$750.00 for design & inspection)
Site evaluation and design services from Professional Engineer or AOSE/PE	\$2,500.00 (\$750.00 for Site Evaluation) (\$1,750.00 for design & inspection)